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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1993

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CHARLES J. REICH,  
*Petitioner,*  
v.

MARCUS E. COLLINS and  
THE GEORGIA DEPARTMENT OF REVENUE,  
*Respondents.*

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On Writ of Certiorari to the Supreme Court of Georgia

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**BRIEF OF TAX EXECUTIVES INSTITUTE, INC.  
AS AMICUS CURIAE IN SUPPORT OF PETITIONER**

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BRIEF OF TAX EXECUTIVES INSTITUTE, INC.  
 AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

Pursuant to Rule 37 of the Rules of this Court, Tax Executives Institute, Inc. respectfully submits this brief as *amicus curiae* in support of the petitioner.<sup>1</sup> Tax Executives Institute (hereinafter "TEI" or "the Institute") is a voluntary, non-profit association of corporate and other business executives, managers, and administrators who are responsible for the tax affairs of their employers. The Institute was organized in 1944 and currently has approximately 5,000 members who represent more than 2,400 of the leading businesses in the United States and Canada.

<sup>1</sup> Tax Executives Institute has received the written consents of the Petitioner and Respondents to the filing of this brief; those consents have been filed with the Clerk of the Court.

The members of the Institute represent a cross-section of the business community in North America, and the companies represented by the Institute's membership are, almost without exception, engaged in interstate commerce. The Institute is dedicated to promoting the uniform and equitable enforcement of the tax laws throughout the Nation, to reducing the costs and burdens of administration and compliance to the benefit of both the government and taxpayers, and to vindicating the Commerce Clause, Due Process, and Equal Protection rights of all taxpayers. Our members have a significant interest in the standards to be applied with respect to state remedies for unconstitutionally collected state taxes.

This case raises fundamental questions concerning the remedies available for taxpayers who have paid state taxes that are subsequently found to contravene the Constitution. In 1989, the Court held in *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), that 4 U.S.C. § 111 (1985) and the constitutional doctrine of intergovernmental tax immunity (as derived from the Supremacy Clause) prohibit the States from taxing federal annuitants more harshly than state annuitants. Four years later, in *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993), the Court held—citing *Griffith v. Kentucky*, 479 U.S. 314 (1987), and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S. Ct. 2439 (1991)—that *Davis* must be applied retroactively by all courts. The Court remanded the case to the Virginia court with instructions to fashion an appropriate remedy in accordance with federal due process standards; cases affecting federal retirees in several other States—including Georgia—were similarly remanded. See, e.g., *Reich v. Collins (Reich I)*, 113 S. Ct. 3028-29 (1993), *vacating and remanding* 422 S.E.2d 846 (Ga. 1992).

This case focuses on whether the predeprivation remedy provided to federal retirees by the State of Georgia passes constitutional muster. The Institute's members and the businesses by whom they are employed have no direct

interest in the resolution of this case. They do, however, have a keen and vital interest in determining the remedies that must be accorded aggrieved taxpayers when a state statute is invalidated on constitutional grounds. The Court's decision in this case promises to affect far more than the State of Georgia's or other States' authority to retain the unconstitutional taxes they improperly collected from federal annuitants. Indeed, the strength and vitality of this Court's holdings on Commerce Clause, Equal Protection, and Due Process issues may well be affected. TEI is concerned about the potential effect of the Court's decision on the equitable administration of state taxing schemes, especially those relating to business taxpayers.

Because TEI members and the businesses by whom they are employed will be materially affected by the application of the Court's decision, the Institute has a special interest in the outcome of this case.

#### SUMMARY OF ARGUMENT

The core issue in this case—whether taxpayers who have been subjected to an unconstitutional tax levy are entitled to refunds of the illegally extracted monies—is the proverbial bad penny: It keeps turning up at the Court. The specific issue before the Court is whether the State of Georgia must refund unconstitutionally collected taxes imposed on federal retirees. In *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), this Court struck down the laws of Michigan and 22 other States that taxed the pensions of retired federal government employees while exempting all or part of the pensions of state government retirees. Last term in *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993), the Court confirmed that the *Davis* decision must be given retroactive effect by all courts. The instant case unequivocally brings the question of remedies to the Court.

The last decade and a half have seen an almost unprecedented number of state taxing statutes struck down

as unconstitutional. In many ways these cases are dissimilar. These cases involved different types of statutes, but there are two attributes they shared. First, they involved a finding by this Court that the State had violated the Constitution in collecting a tax that was not imposed on a favored class of taxpayers. Secondly, each of them triggered the same reaction by one or more of the States that imposed the unconstitutional taxes: an effort to avoid the consequences of their unconstitutional acts by applying the Court's holdings on a prospective-only basis.

The States' refusal to pay refunds—or to fashion other meaningful remedies for taxpayers who have suffered the unconstitutional wrong—was commonly rationalized on equity grounds. Although many argued that the balancing test set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971), could be applied to safeguard the constitutional rights of taxpayers without unduly penalizing the States, experience convinced this Court in *Harper* that the *Chevron Oil* framework was too pliant to be useful. Stated simply, many States did not apply the test in an even-handed or balanced manner, and hence, the results were neither fair nor defensible. Consequently, last term in *Harper* this Court embraced the full retroactivity standard of *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987).

The Supreme Court of Georgia did not dispute that the *Davis* decision applies retroactively. Nevertheless, the Georgia court refused to order a refund to the taxpayer, and that refusal is precisely the type of "mischievous consequences" that the Court warned of more than a century ago in confirming the application of the Supremacy Clause to this Court's decisions. *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 253 (1867).

Concededly, the Court's holding in neither *Harper* nor *Beam* reaches the issue of remedy. The Court's practice of eschewing the issue of remedies reflects the general principle that the question is properly addressed in the first instance by the state courts. The Constitution de-

mands, however, that the relief fashioned by the States accord with federal due process principles. Because there is no right without a remedy, the States should not be empowered to strip federal rules of their practical effect by conjuring up phantom procedural requirements that themselves deny taxpayers due process.

The State of Georgia's statutory scheme comports with the procedural requirements explicated by the Court in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 45-46 (1990). The Georgia Code provides that a taxpayer "shall be refunded any and all taxes" that are determined to have been illegally assessed. GA. CODE ANN. § 48-2-35(a) (1991 and 1993 Supp.). Taxpayers here therefore seem indisputably entitled to seek refunds. This case is before the Court, however, because the court below found the statute inapposite and further found that Georgia law provided a constitutionally sufficient predeprivation remedy. That predeprivation remedy, however, was not even a glimmer in the State of Georgia's eyes until after the decision in *Harper* (three years after *McKesson* spelled out the need for either such a remedy or for meaningful backward-looking relief).

The purpose of the Due Process Clause is to protect individual rights against arbitrary action by the government, but what is more arbitrary than inventing and interposing new requirements after the time for satisfying those requirements has passed? The court below parsed the Georgia refund statute, and studied the other provisions of the Georgia Code, not in search of principle or justice, but for a loophole. This action simply does not pass muster under federal due process principles.

In the past decade, State after State has distended this Court's holdings—on the merits, on the retroactivity question, and now on the issue of remedies—in order to eviscerate the protections accorded taxpayers by the Constitution. The Court "cannot leave to the States the

formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights." *Chapman v. California*, 386 U.S. 18, 21 (1967) (emphasis added). It is time for the Court to end its willing suspension of disbelief concerning the States' ability and willingness to flout the constitutional rights of taxpayers.

For far too long, State after State has adopted what can be described as a "heads I win, tails you lose" approach to cases implicating the constitutional rights of taxpayers. The States should not be permitted to thwart the judgments of this Court by conjuring up one excuse after another for refusing to return to taxpayers what the States had no right to take in the first instance.

Half a decade has passed since the Court held laws like the State of Georgia's here to be unconstitutional. Like the person who continually promises to reform but repeatedly fails, the word of the States should no longer be considered sufficient: They should be judged by their actions, and their actions should be found wanting. As the Court so forcefully, and rightfully, proclaimed in *Griffith v. Kentucky*: "The time for toleration has come to an end." 479 U.S. at 323.

The judgment of the court below should be reversed and a refund ordered to be made to the petitioner.

## ARGUMENT

*The time for toleration has come to an end.*<sup>2</sup>

### I.

The core issue in this case—whether taxpayers who have been subjected to an unconstitutional tax levy are entitled to refunds of the illegally extracted monies—is the proverbial bad penny: It keeps turning up at the Court. To be sure, the taxing schemes invalidated by the Court have varied. And the focus of the Court's scrutiny has shifted from the constitutional infirmities of state statutes (under the Commerce Clause, the Due Process Clause, and the doctrine of intergovernmental immunity), to whether a holding of unconstitutionality must be given retroactive effect, to whether a State may properly deny refunds to taxpayers even after this Court has confirmed that a decision invalidating the statute applies retroactively. Nevertheless, the issue of refunds underlay all of the cases.

The specific issue before the Court in this case is whether the State of Georgia must refund taxes imposed on federal retirees in violation of the constitutional doctrine of intergovernmental immunity and 4 U.S.C. § 111 (1985). In *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), this Court struck down the laws of Michigan and 22 other States that taxed the pensions of retired federal government employees while exempting all or part of the pensions of state government retirees. Last term in *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993), the Court confirmed that the *Davis* decision must be given retroactive effect by all courts. The instant case poses the issue whether refunds must be paid to federal retirees in Georgia who were subjected to the unconstitutional taxing scheme. It therefore unequivocally brings the question of remedies to the Court. That ques-

<sup>2</sup> *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987) (quoting *United States v. Johnson*, 457 U.S. 537, 555-56 n.16 (1982)).

tion, however, was undeniably present in the related cases involving the constitutional issue (*Davis*) and retroactivity (*Harper*).

Taxpayers did not sue in *Davis* simply to have the Michigan statute invalidated. They sued for refunds of unconstitutionally collected taxes. Taxpayers did not sue in *Harper* simply to have the Court confirm that the decision in *Davis* applied retroactively in the Commonwealth of Virginia. They sued for refunds of unconstitutionally collected taxes. Here, finally, the issue of refunds is joined, but the Court cannot properly consider the case one of first impression. From the outset, taxpayers have been seeking the refund of what the States improperly took from them, and the States have been seeking to retain that which the Court has held they had no right to take in the first instance. This basic truth—that the States have funds properly belonging to the taxpayers—should impel reversal of the court below and a judgment ordering that a refund be made to the petitioner.

## II.

The last decade and a half have seen an almost unprecedented number of state taxing statutes struck down as unconstitutional. For example, in *Tyler Pipe Indus. v. Washington Dep't of Revenue*, 483 U.S. 232, 248 (1987), the Court invalidated the multiple activities exemption of Washington State's business and occupation (B&O) tax as repugnant to the Constitution's Commerce Clause. See U.S. Const. art. I, § 8, cl. 3. This decision was preceded by *Armco Inc. v. Hardesty*, 467 U.S. 638, 645-46 (1984), in which the Court held that the State of West Virginia's B&O tax similarly contravened the Commerce Clause.

The Court also invalidated a state taxing scheme in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), which involved the State of Hawaii's exemption of local products from the liquor excise tax. In that case, the

Court concluded that the tax constituted unacceptable "economic protectionism" and therefore contravened the Commerce Clause. *Id.* at 273. This holding was reinforced by the Court's decisions in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 45-46 (1990), and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, —, 111 S. Ct. 2439, 2441 (1991), which struck down comparable statutes in Florida and Georgia, respectively.

In *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987), the Court considered the constitutionality of Pennsylvania's highway use tax. It struck down the law because it impermissibly imposed a heavier tax burden on out-of-state businesses that compete in an interstate market than it imposed on its own residents who also engage in commerce among the States.<sup>3</sup> *Id.* at 286.<sup>4</sup> More recently, in *Davis* the Court held that the constitutional doctrine of intergovernmental tax immunity, which is derived from the Supremacy Clause (U.S. Const. art. VI, cl. 2), and the applicable federal statute (4 U.S.C. § 111 (1985)) precluded the State of Michigan from taxing federal annuitants more harshly than it taxed state annuitants. 489 U.S. at 817.

In many ways these cases are dissimilar. They involved different types of statutes (though with the exception of *Davis*, they all implicated the Commerce Clause rights of interstate businesses). But there are two attributes they share. First, they involved a finding by this Court that the State had violated the Constitution in collecting a tax that was not imposed (or not imposed to the same extent) on a favored class of taxpayers (be they domestic

<sup>3</sup> See also *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 882-83 (1985) (holding unconstitutional the State of Alabama's discriminatory tax on foreign insurers).

<sup>4</sup> In *American Trucking Ass'ns v. Smith*, 496 U.S. 167 (1990), a divided Court declined to hold that its decision in *Scheiner* must apply retroactively.

businesses or state annuitants). Secondly, each of them triggered the same reaction by one or more of the States that imposed similarly unconstitutional taxes: an effort to avoid the consequences of their unconstitutional acts by applying the Court's holdings on a prospective-only basis. That is to say, even after the Court struck down the statutes as contravening the Constitution, some (albeit not all) States resisted efforts to refund the taxes that they had collected under the invalidated laws.<sup>5</sup>

The States' refusal to pay refunds—or to fashion other meaningful remedies for taxpayers who have suffered the unconstitutional wrong—was commonly rationalized on equity grounds. The States have essentially argued that the statutes at issue had been enacted in good faith, that the monies collected under those discriminatory statutes had already been spent, and that the issuance of refunds would threaten the fiscal well-being of the States. In reaching this result, the States generally employed the analysis set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971), which focused on whether the decision established a new principle of law; whether, based on the history of the rule in question, its purpose, and effect, the nonretroactive application would advance or retard the operation of the new rule; and whether nonretroactive application was necessary to avoid injustice or hardship.

Although many argued that *Chevron Oil*'s balancing test could be applied to safeguard the constitutional

<sup>5</sup> The refusal to apply the Court's holdings on a retroactive basis has not been universal. For example, following the decision in *Davis*, courts in several States properly ordered refunds to be issued to affected federal annuitants (following the state revenue departments' initial refusal to issue refunds). *E.g.*, *Pledger v. Bosnick*, 811 S.W.2d 286, 292 (Ark. 1991), cert. denied, 113 S. Ct. 8034 (1993); *Kuhn v. Colorado*, 817 P.2d 101, 110 (Colo. 1991), cert. dismissed, 112 S. Ct. 1925 (1992); *Hackman v. Director of Revenue*, 771 S.W.2d 77, 81 (Mo. 1989) (en banc), cert. denied, 493 U.S. 1019 (1990); *Burns v. New Mexico*, No. SF 89-1314(c) (1st Jud. Dist. Santa Fe County, Apr. 5, 1990). See also *In re Schirck*, No. 90-5201 RPD (Tax Comm'r of W. Va., Sept. 23, 1991).

rights of taxpayers without unduly penalizing the States (see, e.g., *Harper*, 113 S. Ct. at 2525 (Kennedy, J., with White, J., concurring), and *id.* at 2526 (O'Connor, J., with Rehnquist, C.J., dissenting)), experience convinced this Court in *Harper* that the *Chevron Oil* framework was too pliant to be useful. Stated simply, many States did not apply the test in an even-handed or balanced manner, and hence, the results were neither fair nor defensible. Too many of the States chose to interpret the three prongs of the Court's holding in a parochial, self-serving, result-oriented manner. In their quest for revenue, the States transmogrified the *Chevron Oil* test into a standard so malleable that virtually all rulings of unconstitutionality could be applied, at a State's choosing, on a prospective-only basis. The cumulative effect of all the States' actions could not help but influence this Court's decision last year to discard *Chevron Oil* in favor of a more absolute standard that more fully vindicated the rights of taxpayers and better served the goal of certainty.

Consequently, last term in *Harper* this Court embraced its earlier statement in *Griffith v. Kentucky*, 479 U.S. 314 (1987), that "[t]he time for toleration has come to an end." *Id.* at 323 (quoting *United States v. Johnson*, 457 U.S. 537, 555-56 n.16 (1982)). *Griffith* holds that new rules for the conduct of criminal prosecutions must apply retroactively to all pending or non-final cases, even if they constitute a "clear break" with the past. 479 U.S. at 328. In *Harper*, the Court extended the rule to civil cases, unequivocally holding that a rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating federal law. *Harper*, 113 S. Ct. at 2513,<sup>6</sup> citing

<sup>6</sup> See *Harper*, 113 S. Ct. at 2517 ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.").

*Griffith, supra, and Beam, supra.* Indeed, the Court noted that Justice Souter's opinion in *Beam* was itself unequivocal:

In announcing the judgment of the Court, Justice SOUTER laid down a rule for determining the retroactive effect of a civil decision: After the case announcing any rule of federal law has "appl[ie]d that rule with respect to the litigants" before the court, no court may "refuse to apply [that] rule . . . retroactively."

*Harper*, 113 S. Ct. at 2517 (quoting *Beam*, 111 S. Ct. at 2446) (brackets and ellipsis in original).

### III.

The Supreme Court of Georgia did not dispute that the *Davis* decision applies retroactively (though the trial court had done so). In light of the Court's holdings in *Beam* and *Harper*, it could hardly do so. See *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (it is for the Supreme Court to prescribe constitutional standards, and the lower courts are obliged to adhere to those standards "no matter how misguided the judges of those courts may think [them] to be."); accord *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). Nevertheless, the Georgia court refused to order a refund to the taxpayer, and its refusal is precisely the type of "mischievous consequences" that the Court warned of more than a century ago in confirming the application of the Supremacy Clause to this Court's decisions. *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 253 (1867).

Concededly, the Court's holding in neither *Harper* nor *Beam* reaches the issue of remedy. Indeed, in *Harper*, the Court expressly declined to enter judgment for the taxpayers "because federal law does not necessarily entitle them to a refund." 113 S. Ct. at 2519. The Court's practice of eschewing the issue of remedies reflects the general principle that the question is properly addressed in

the first instance by the state courts. See *McKesson*, 496 U.S. at 32 n.16 ("In the recent past, after invalidating a state tax scheme on Commerce Clause grounds, we have left state courts with the initial duty upon remand of crafting appropriate relief in accord with both federal and state law." (citations omitted)). The Constitution demands, however, that the relief fashioned by the States accord with federal due process principles. *American Trucking Ass'ns v. Smith*, 496 U.S. at 181 (plurality opinion); accord *Harper*, 113 S. Ct. at 2519. Thus, while the States have previously retained flexibility in responding to this Court's decisions, *McKesson*, 496 U.S. at 39-40, that flexibility is not a license to eviscerate those decisions through legislative or juridical legerdemain.

In *Harper*, Justice Thomas explained that the Supremacy Clause does not allow the federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. 113 S. Ct. at 2519. Because there is no right without a remedy, the States should similarly not be empowered to strip federal rules of their practical effect by conjuring up phantom procedural requirements that themselves deny taxpayers due process. That is precisely what has occurred in the instant case.

In *McKesson*, the Court stated that, to satisfy the requirements of due process, the State must provide an aggrieved taxpayer either with a predeprivation hearing (without placing the taxpayer seeking such a hearing under duress<sup>7</sup>) or with meaningful backward-looking relief. 496 U.S. at 31-32. The Court also acknowledged that the State might properly require that the challenged taxes be paid under protest, or that refund claims be filed within a specified period of time. *Id.* at 45. In other

<sup>7</sup> The Court explained that "when a tax is paid in order to avoid financial sanctions or a seizure of real or personal property, the tax is paid under 'duress' in the sense that the State has not provided a fair and meaningful predeprivation hearing." 496 U.S. at 38 n.21.

words, "a State need not provide [a] predeprivation process for the exaction of taxes." *Id.* at 37 (footnote omitted).<sup>8</sup> To be meaningful—and constitutionally sufficient—however, the taxpayer's remedy must be "clear and certain." *Id.* at 39 (quoting *Atchison, T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280, 285 (1912) (Holmes, J.)).

The State of Georgia's statutory scheme comports with the procedural requirements explicated by the Court in *McKesson*. Section 48-2-35(a) of the Official Code of Georgia Annotated states:

A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state, whether paid voluntarily or involuntarily, and shall be refunded interest on the amount of the taxes or fees at the rate of 9 percent per annum from the date of payment of the tax or fee to the commissioner.

GA. CODE ANN. § 48-2-35(a) (1991 and 1993 Supp.). The taxpayers here would seem to be indisputably entitled to seek refunds under this statute. This case is before the Court, however, because the court below found the statute inapposite and further found that Georgia law provided a constitutionally sufficient predeprivation remedy. That predeprivation remedy, however, was not even a glimmer in the State of Georgia's eyes until after the decision in *Harper* (three years after *McKesson* spelled out the need either for such a remedy or for meaningful backward-looking relief).

Indeed, when the court below considered the issue after the *Beam* decision, it simply stated that the refund statute

<sup>8</sup> Indeed, the Court explained in some detail why States could properly decide not to allow taxpayers to litigate their tax liabilities prior to payment: It could "threaten a government's financial security, both by creating unpredictable interim revenue shortfalls against which the State cannot easily prepare, and by making the ultimate collection of validly imposed taxes more difficult." *Id.* (footnote omitted).

"does not address the situation where the law under which the taxes are assessed and collected is itself subsequently declared to be unconstitutional or otherwise invalid" and then chimerically imposed a requirement that, in respect of unconstitutionally or otherwise invalid statutes, "a taxpayer must have made a demand for refund at the time the tax is paid or at the time his tax return is filed, whichever occurs last. Failure to do so bars any future claim." *Reich v. Collins* (*Reich I*), 422 S.E.2d 846, 849 (Ga. 1992), reprinted at Appendix D to Charles J. Reich's Petition for a Writ of Certiorari to the Supreme Court of Georgia (App.), at App. 8D. Then, following *Beam*, the State discovered the applicability of Georgia's Administrative Procedure Act (APA) (GA. CODE ANN. § 50-13-12 (1990)) as well as Georgia's declaratory judgment provisions (*id.* §§ 9-4-1, *et seq.* (1982)), which it argued (and the court below held) satisfied *McKesson's* requirement of a predeprivation hearing. *Reich v. Collins* (*Reich II*), No. S92A0621 (Ga. Dec. 2, 1993), reprinted at Appendix A to Charles J. Reich's Petition for a Writ of Certiorari to the Supreme Court of Georgia (App.), at App. 4A-5A.

Even assuming that the Georgia APA procedure would not place the taxpayer under duress (thereby vitiating the supposed sufficiency of the predeprivation remedy), can such a patchwork—concocted by the State years after the taxes were paid—satisfy the requirement that the taxpayer's remedy be "clear and certain"? *Amicus* TEI submits that to pose the question is to answer it. The purpose of the Due Process Clause is to protect individual rights against arbitrary action by the government, but what is more arbitrary than inventing and interposing new requirements after the time for satisfying those requirements has passed?<sup>9</sup> The court below parsed the Georgia

<sup>9</sup> See *Reich II*, at App. 8A (Carley, J., with Sears-Collins, J., dissenting) ("nothing under the specific provisions of the state tax code can be said to have provided appellant with the opportunity for a constitutionally meaningful predeprivation challenge to his

refund statute, and studied the other provisions of the Georgia Code, not in search of principle or justice, but for a loophole. It sought not to implement the Court's mandate in *Beam, Davis and Harper*, but to obliterate it. That the court below's action might pass muster under federal due process principles truly beggars the imagination.<sup>10</sup>

#### IV.

*Amicus* TEI acknowledges that the Court is generally loath to impinge on the state courts' prerogative to fashion remedies after the substantive issues in the case are decided. But the discretion granted to the States in respect of remedying unconstitutional taxation has been repeatedly, albeit not universally, abused. Indeed, the actions of the court below, while regrettable, are hardly surprising. History is irrefutable: In the past decade, State after State has distended this Court's holdings—on the merits, on the retroactivity question, and now on the issue of remedies—in order to eviscerate the protections accorded taxpayers by the Constitution.

Two centuries ago, the Framers recognized the need for the federal courts to vigilantly safeguard rights against the parochialism of the States. In *The Federalist No. 80*, Alexander Hamilton used the example of claims to land

payment of taxes pursuant to the unconstitutional provisions of [the Georgia tax code]."; *id.* at App. 13A-14A (Carley, J., with Sears-Collins, J., dissenting) ("... I believe that appellant's payment of the unconstitutional taxes was not made 'voluntarily,' but was made under 'duress.' I believe, therefore, that the majority opinion erroneously 'confine[s] [appellant] to a lesser remedy' than that which federal due process demands.") (citation omitted, and bracketed material added by Justice Carley).

<sup>10</sup> See *McKesson*, 496 U.S. at 39 (if a tax is beyond the State's power to impose, the State has no choice but to "undo" the unlawful deprivation by making refunds "because allowing the State to 'collect these unlawful taxes by coercive means and not incur any obligation to pay them back . . . would be in contravention of the Fourteenth Amendment.'" (quoting *Ward v. Board of Comm'rs of Love County*, 253 U.S. 17, 24 (1920))).

under grants of different States to underscore the need for diversity jurisdiction:

The courts of neither of the granting states could be expected to be unbiased. The laws may have even prejudged the question, and tied the courts down to decisions in favour of the grants of the state to which they belonged. And even where this had not been done, it would be natural that the judges, as men, should feel a strong predilection to the claims of their own government.

THE FEDERALIST NO. 80, reprinted in II THE DEBATE ON THE CONSTITUTION 476, 479-80 (Library of America 1993). Justice Story elaborated in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816):

The constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice.<sup>11</sup>

See John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 22-28 (1948) (diversity jurisdiction was the product in part of "[t]he desire to avoid regional prejudice against commercial litigants, based in small part on experience and in large part on common-sense anticipation.").

To be sure, the insularity of the States has generally tempered over the years, and the concerns that led to the development of diversity jurisdiction are not wholly present here. (Indeed, although many of the cases coming before the Court in recent years have involved the Commerce Clause rights of out-of-state businesses, here it is

<sup>11</sup> See THE FEDERALIST NO. 81 (Alexander Hamilton), reprinted in II THE DEBATE ON THE CONSTITUTION, *supra*, 483, 487-88 ("The most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes . . .").

the citizens of the State—albeit ones formerly employed by the Federal Government—who are denied their rights.) Nevertheless, the principle remains the same: the Court “cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights.” *Chapman v. California*, 386 U.S. 18, 21 (1967) (emphasis added).

*Amicus* TEI submits that it is time for the Court to end its willing suspension of disbelief concerning the States’ ability and willingness to flout the constitutional rights of taxpayers. Concededly, not all States have persisted in interpreting this Court’s holdings (and their own statutes) to deny meaningful relief to aggrieved taxpayers. For example, on April 1, 1994, the Supreme Court of Minnesota finally effectuated this Court’s 1983 decision in *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392 (1983), by ordering refunds paid to banks that had paid taxes on income from federal obligations under a state statute that violated the Supremacy Clause and 31 U.S.C. § 3124 (1983). *Cambridge State Bank v. James*, No. CO-89-2097, 1994 Minn. LEXIS 241 (Minn. Apr. 1, 1994), on remand from *Norwest Bank Duluth v. McClung*, 113 S. Ct. 3026 (1993), vacating and remanding *Cambridge State Bank v. James*, 480 N.W.2d 647 (Minn. 1992). Holding that Minnesota’s taxing scheme did not provide a clear and certain predeprivation remedy, the Minnesota court concluded that the banks were entitled to refunds of the unconstitutional tax on interest earned on federal obligations. 1994 Minn. LEXIS 241, at \*21-\*23. See *id.* at \*25-\*26 (Page, J., concurring specially) (refunds should be ordered, without analysis of adequacy of any predeprivation remedy, under refund statute in existence at the time the taxes were paid; that statute provided “[n]otwithstanding any other provision of law to the contrary, in the case of any overpayment the commissioner \* \* \* shall refund any balance of more than one dollar \* \* \* if the taxpayer shall so request.”) (ellipses added by Justice Page).

Notwithstanding the Minnesota court’s eventual decision in *Cambridge State Bank* to order refunds, the question remains why the State’s implementation of this Court’s decision in *Memphis Bank* took more than a decade. The axiom *Justice delayed is justice denied* takes on even greater poignancy in the instant case where the taxpayer is a retiree.<sup>12</sup>

Unless the Court orders meaningful relief in this and similar cases, the States will continue to have an incentive to enact unconstitutional statutes—to “roll the dice” with the constitutional rights of taxpayers, knowing that—at worst—they may have to mend their ways in the future.<sup>13</sup>

<sup>12</sup> On April 8, 1994—one week before Americans must file their federal income tax returns—the Commonwealth of Virginia gave the taxpayers in *Harper* its formal response to the Court’s decision in that case: a half decade after *Davis* confirmed that Virginia (and other States) had violated the constitutional rights of federal retirees, the Commonwealth said it would give the taxpayers fifty cents on the dollar, without interest, spread out over four years. See Peter Baker, Va. Offering Partial Tax Repayment: Federal Retirees Would Get Only Half, WASHINGTON POST A1, A13 (Apr. 9, 1994). Having lost in the Supreme Court of the United States, the Commonwealth engaged in a not-too-subtle game of intimidation and, perhaps, even abuse of process. Take it or leave it, Virginia essentially said about its half-hearted, half-a-loaf offer: If you don’t take it, we shall keep you tied up in court for as long as we can. Is that action not inconsistent with *Harper*’s mandate? Is that the proper vindication of constitutional rights by the State that gave the Nation Washington, Jefferson, Madison, and Monroe? Or is Virginia’s bullying tactic too clever by half? See *id.* at A13 (quoting Rose Musumeci, a 72 year-old federal retiree, as follows: “We paid in 100 percent. I just don’t think it’s right. I’m sure if the positions were reversed, Virginia would want 100 percent of the taxes.”).

<sup>13</sup> That the States’ approach in the cases invalidating state taxing schemes is driven more by their desire to avoid responsibility for their unconstitutional acts than by a reasonable interpretation of this Court’s decisions is perhaps best illustrated by a case in which the roles of taxpayers and the States on the retroactivity issue were reversed from what they typically have been. In *Allied-Signal, Inc. v. Director, Div. of Taxation*, 112 S. Ct. 2251 (1992), the Court con-

The failure of the Court to accord taxpayers anything more than a pyrrhic victory would assuredly chill efforts to secure their constitutional rights.

In addition, the States' denial of refunds could disrupt the orderly administration of the tax laws in the States by encouraging taxpayers not to pay the suspect tax (rather than to pay the tax and then seek a refund that they may never receive). Indeed, the Georgia court's willingness to fabricate new procedural requirements—such as the taxpayer's having to sue under the Georgia APA or to pay their taxes under protest—could well throw the voluntary self-assessment tax system into disarray. To protect their rights, sophisticated taxpayers might well feel compelled to make *all* payments under protest (and then to file protective claims for refunds in respect of the entire amount), overburdening state revenue departments and ultimately

sidered whether two earlier decisions—*ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307 (1982), and *F.W. Woolworth Co. v. Taxation & Revenue Dep't*, 458 U.S. 354 (1982)—should be overruled. Had those cases been overturned, the States would have been free to tax a larger share of the income of out-of-state businesses, and the Court invited briefs on whether any such overruling should be retroactive. Although the case would have involved the overruling of express and directly applicable Supreme Court precedent of less than ten years' duration (which itself relied on an unbroken chain of Supreme Court decisions dating back to 1875)—and notwithstanding the States' almost uniform resistance to retroactive holdings where taxing schemes have been invalidated—the State of Georgia and 28 other States, the District of Columbia, Guam, and the Virgin Islands filed a brief unabashedly arguing that “the *Chevron Oil* test can accommodate both an overruling decision and a holding of retroactivity.” See Brief by Alabama, Arizona, Arkansas, Colorado, District of Columbia, Florida, Georgia, Guam, Hawaii, Indiana, Kentucky, Louisiana, Michigan, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Texas, Utah, Virgin Islands, Virginia, Washington, West Virginia, Wisconsin, and Wyoming as *Amici Curiae* in Support of Respondent, at 16, *Allied-Signal, Inc. v. Director, Div. of Taxation*, 112 S. Ct. 2251 (1992) (No. 91-615). Such an “accommodation,” however, which some States seem ready to carry over to the issue of remedy, seems completely untethered by principle or consistency.

the courts. The unwary, however, would likely find themselves deprived of any real remedy, possibly undermining their trust in the fairness and integrity of the system. Thus, while a requirement of paying under protest might be constitutionally palatable on a going-forward basis (assuming the procedure is clear and certain), it could not help but undermine the efficiency and generally non-adversarial nature of the tax collection system.

## V.

The States have it within their power to enact constitutional tax statutes. What is more, they have authority to address any revenue shortfall produced by providing taxpayers with a meaningful remedy: They can levy and collect taxes equal to the amount of any refunds. The question is whether the fiscal hole is to be filled through constitutional or unconstitutional means.

This is not to say that the equities should never play a role in the fashioning of remedies. See *Beam*, 111 S. Ct. at 2448; *Harper*, 113 S. Ct. at 2526 (Kennedy, J., with White, J., concurring in part and concurring in the judgment). But whether the issue is one of retroactivity or remedy, the equities here do not rest with the State. Clearly, the issue should not turn on whether the State had “counted on” the unconstitutionally collected taxes. If such an allegation of “hardship” were deemed sufficient to justify the refusal to grant refunds, the taxes collected under unconstitutional tax statutes would rarely, if ever, be refunded. States invariably spend the revenues they collect. The sounder approach is to examine whether *undue* hardship would result from a judgment ordering refunds of the unconstitutionally collected taxes. Under such an analysis, a different result generally obtains, for any “hardship” of which the States might complain is one of their own making—the result of their own unconstitutional acts.<sup>14</sup>

<sup>14</sup> With respect to the facts of the instant case, any claim of hardship rings especially hollow. After all, the State of Georgia just

For far too long, State after State has adopted what can be described as a "heads I win, tails you lose" approach to cases implicating the constitutional rights of taxpayers. If a State prevails in litigation and the challenged statute is sustained, all taxpayers (rightfully) lose. But if a State loses and the statute is found to be constitutionally deficient, the State should not be allowed to argue first that the decision should apply on a prospective-only basis, and then (when that argument fails under *Beam* and *Harper*) insist that, although retroactive, the decision does not necessitate refunds. The States should not be permitted to thwart the judgments of this Court by conjuring up one excuse after another for refusing to return to taxpayers what the States had no right to take in the first instance. Intransigence cannot be rewarded or ignored.

Half a decade has passed since the Court held laws like the State of Georgia's here to be unconstitutional. Half a decade. And still many States persist in keeping the unconstitutionally extracted taxes. Indeed, not only has the State of Georgia refused to refund the taxes unconstitutionally collected from federal retirees (five years after *Davis*), but the State has similarly refused to refund the taxes held to be unconstitutional in *McKesson* four years ago and in *Beam* three years ago (in which Georgia was directly involved). Moreover, the State of Washington has not yet refunded any of the monies collected under the taxing scheme struck down seven terms ago in *Tyler Pipe*, and some of the taxpayers involved in *Armco* a decade ago have yet to see a penny of the tax dollars the State of West Virginia unconstitutionally collected under the B&O tax. (Other taxpayers in West Virginia have settled their cases, for but a fraction of the amount at issue.)

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recently enacted a \$100-million tax cut for fiscal year 1994-1995, projecting a substantial seven-percent growth in revenues. See Joseph Spiers, *Tax-Cut Time for the States*, FORTUNE, Apr. 18, 1994, at 25.

Similarly, the taxpayer in *McKesson* settled its claim against the State of Florida for less than full value, while other affected taxpayers have recovered none of the taxes the State unconstitutionally collected—a full 10 years after *Bacchus*. Most recently, the Commonwealth of Virginia, whose efforts to apply *Davis* prospectively were cast aside in *Harper*, has thrown down the gauntlet, telling federal annuitants that unless they accept a fraction of what was unlawfully taken from them by September 15, 1994 (i.e., before the decision in this case is handed down), they had better plan on spending years in court. See Peter Baker, *Va. Offering Partial Tax Repayment: Federal Retirees Would Get Only Half*, WASHINGTON POST A1, A13 (Apr. 9, 1994); note 12 *supra*.

Too frequently, the States seem unwilling to abide by the rules and to face up to the consequences of their actions. Like the person who continually promises to reform but repeatedly fails, the word of the States should no longer be considered sufficient: They should be judged by their actions, and their actions should be found wanting. As the Court so forcefully, and rightfully, proclaimed in *Griffith v. Kentucky*: "The time for toleration has come to an end." 479 U.S. at 323.

**CONCLUSION**

For the foregoing reasons, the Court should reverse the decision of the Supreme Court of Georgia and order that a refund be made to the petitioner in this case.

Respectfully submitted,

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